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No. 09-257

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ERICA CORDER,
Petitioner

v.

LEWIS PALMER SCHOOL DISTRICT No. 38,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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LEGAL ARGUMENT

Respondent Lewis-Palmer School District No. 38 ("the District") tries to convince this Court that there is no misapplication of its precedents and no inter-circuit conflicts by failing to address the precedents which conflict with the Tenth Circuit's ruling. The District also cites to allegations in the Complaint and offers commentary on allegations it claims are not present in the Complaint. The District's strategy demonstrates even more clearly that Petitioner Erica Corder's ("Petitioner") Petition for a Writ of Certiorari should be granted.

I. THE DISTRICT'S OMISSION OF *TINKER* DOES NOT ERASE THE TENTH CIRCUIT'S ERROR IN USING *KUHLMEIER* INSTEAD OF *TINKER* TO ANALYZE PETITIONER'S CLAIMS.

The District incorrectly asserts that *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), is the proper analytical framework for Petitioner's claims, and erroneously states that *Kuhlmeier* is the **only** standard under which student speech cases are analyzed. (Opposition Brief, p. 16) ("*Hazelwood*, the framework established by this Court for managing speech questions that arise in the school setting."). Neither *Kuhlmeier*, nor any other precedent, is a "one size fits all" solution to all student free speech questions.

In *Kuhlmeier*, this Court reiterated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," as established in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503,

506 (1969). *Kuhlmeier*, 484 U.S. at 266. Students cannot be punished for merely expressing their views on school premises unless authorities have reason to believe that the expression will substantially interfere with the work of the school or impinge upon other students' rights. *Id.* (citing *Tinker*, 393 U.S. at 509, 512-513). Cases subsequent to *Tinker* have clarified that students' rights are not "coextensive" with the rights of adults in non-school settings, but must be analyzed in light of the special circumstances of the school environment. *Id.* (citing *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker*, 393 U.S. at 506). *Kuhlmeier* did not replace *Tinker*, but elucidated how the "special circumstances of the school environment" can affect the rights established in *Tinker*. *Id.* at 271. As this Court explained, *Tinker* addressed the question of whether educators can silence a student's personal expression that happens to occur at school, while *Kuhlmeier* addressed educators' authority over "school-sponsored publications, theatrical productions, and other expressive activities" that could be perceived as bearing the school's imprimatur. *Id.* This Court's finding that educators could exercise greater control over student speech in the latter circumstance did not abrogate the rights established in *Tinker*. *See Morse v. Frederick*, 551 U.S. 393, 403-405 (2007) (affirming that *Tinker* remains the baseline standard for student free speech rights, subject to qualifications established by *Fraser*, *Kuhlmeier* and *Morse*).

Nevertheless, the District implicitly asserts that *Tinker* is no longer good law when it attempts to defend the Tenth Circuit's use of *Kuhlmeier* while completely ignoring *Tinker*. (Opposition Brief, pp. 7-10). Rather than analyzing all of this Court's student speech precedents, the District merely

concludes that the Tenth Circuit was correct to use *Kuhlmeier* because *Kuhlmeier* is the only standard it could have used. (Opposition Brief, p. 16). By omitting *Tinker* from its analysis, the District could claim that expanding *Kuhlmeier* to valedictory speeches is wholly consistent with this Court's precedents. (Opposition Brief, p. 7).

However, *Tinker*'s absence from the District's discussion does not erase *Tinker* or resolve the conflict apparent in the Tenth Circuit's ruling. This Court has consistently re-affirmed the continuing viability of *Tinker*'s protection of students' constitutional rights. *See Morse*, 551 U.S. at 396 (reiterating that "[o]ur cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" even while holding that the school properly sanctioned a student for unfurling a banner with a pro-drug message). *Fraser*, *Kuhlmeier* and *Morse* represent carefully crafted limitations upon student speech in specific settings and under specific circumstances: sexually-charged speeches at school assemblies (*Fraser*), articles regarding divorce and teen pregnancy in journalism assignments (*Kuhlmeier*), and pro-drug messages during a school gathering in the community (*Morse*). At no point has this Court placed all student expression under the control of school administrators, as the District asserts.

The Tenth Circuit recognized the continuing validity of *Tinker*, but departed from *Tinker*'s core tenet of protection of a student's individual First Amendment rights when it rejected *Tinker* in favor of *Kuhlmeier*. The Tenth Circuit reasoned that a high school commencement ceremony occurring after students have completed their education is the

same as a journalism class so that individual speeches given at the ceremony can be regulated as strictly as are homework assignments. (App. at 18a-19a). That conclusion contradicts this Court's reasoning in *Kuhlmeier* by contravening this Court's definitions of "school-sponsored" and "imprimatur."

In *Kuhlmeier*, this Court carefully defined the exception it was drawing to *Tinker*. The Court emphasized that educators cannot punish students for expressing their views on the school premises, but can control the manner of speech that occurs in the classroom or in a mandatory assembly held during the school day. *Kuhlmeier*, 484 U.S. at 266-267. That meant that educators could discipline a student for offering a sexually explicit speech during an assembly, *Fraser*, 478 U.S. at 683, and could remove articles about divorce and teen pregnancy from a newspaper that was created as part of a journalism class. *Kuhlmeier*, 484 U.S. at 266-267. In each of those instances, the events could be considered part of the school's curriculum in that they were supervised by faculty and designed to impart particular knowledge or skills to student participants. *Id.* at 271. In both cases, this Court emphasized the nexus between the activities and the ongoing educational program of which the student participants were still a part. *Id.*; *Fraser*, 478 U.S. at 683.

No such nexus is present in this case. The event was not a school-day assembly, field trip, theatrical production or class assignment designed to impart skills or knowledge to students. Instead, it was a commencement ceremony, an honorary gathering honoring the students' completion of their educational program. The graduates had obtained the knowledge and the skills that the District required be imparted to them and were now being recognized for their

accomplishment. Nevertheless, the Tenth Circuit reasoned that the ceremony was "school-sponsored" because the District "chose" the valedictory speakers. (App., 20a). However, students were not "chosen" by administrators, but earned the title of valedictorian by completing their education with a 4.0 GPA. (App., 20a). Similarly, the valedictorians chose whether any or all of them would speak and what their topics would be. (App., 38a). It was not, as the Tenth Circuit claimed, a faculty supervised activity similar to the journalism class in *Kuhlmeier*. (App., 20a). The optional speeches presented after the completion of academic requirements do not bear the indicia of school sponsorship present in the journalism class assignment in *Kuhlmeier*.

The District attempts to bring the commencement ceremony under the "school-sponsored" umbrella by claiming that the ceremony was intended to impart lessons to students, like the newspaper in *Kuhlmeier*. (Opposition Brief, p. 8). The District admits that graduation terminates a student's obligation to learn, but then says "a student's decision to stop learning does not require educators to stop teaching." (Opposition Brief, p. 8). The District does not explain how an educator's unilateral decision to try to teach something to a graduate who is no longer obligated to accept the instruction can create a legally enforceable right sufficient to override *Tinker*'s protection of student speech. Nor does the District explain how the fact that *Kuhlmeier* is not limited to formal classroom curricular exercises leads to the conclusion that the commencement ceremony is "school-sponsored." The District states that *Kuhlmeier* applies to "publications, theatrical productions and *other expressive activities that students, parents and members of the community might reasonably perceive to bear the imprimatur of the school,*" and then leaps

to the conclusion that the emphasized phrase describes the commencement ceremony. (Opposition Brief p. 9, citing *Kuhlmeier*, 484 U.S. at 270-271 with emphasis added).

The District offers no analysis to demonstrate how the commencement ceremony falls within this Court's carefully crafted exception to *Tinker*. Instead, the District discusses allegations that are purportedly not in Petitioner's Complaint, and argues that the absence of those facts prove the presence of school sponsorship under *Kuhlmeier*. (Opposition Brief at pp. 9-10). That disjointed and illogical narrative contravenes this Court's cautious approach to limitations on student speech and illustrates why the petition should be granted.

II. THE CONFLICT BETWEEN THE TENTH CIRCUIT AND OTHER CIRCUITS IS NOT ERASED BY THE DISTRICT'S FAILURE TO DISCUSS THE CONFLICTING RULINGS.

The conflict between the Tenth Circuit's conclusion that a student-initiated religious reference at graduation is school-sponsored speech and other circuits' that it is private student speech could hardly be clearer. The Tenth Circuit ruled that a student-initiated reference to religion during a commencement speech was "school-sponsored." (App.,21a). The Fifth Circuit ruled that student-initiated voluntary prayer offered during commencement was not "school-sponsored." *Ingebretsen v. Jackson Public School Dist.* 88 F.3d 274, 280 (5th Cir. 1996). The Eleventh Circuit made similar rulings and emphasized: "The first principle must always be that genuinely student-initiated religious speech must be permitted. A student's individual decision to pray or otherwise speak religiously is not the State's command."

Chandler v. James, 180 F.3d 1254, 1264 (11th Cir. 1999); *See also, Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc), discussed below.

The District denies that there is any conflict. Instead, the District claims that circuit courts have uniformly upheld the right of school districts to control student graduation speeches. (Opposition Brief at p. 10). The District makes this assertion by failing to cite *Ingebretsen* or *Chandler*, misstating the facts and holding in *Adler*, and citing but not analyzing two Ninth Circuit and one district court case. (Opposition Brief, at pp. 10-11) (citing *Lassonde v. Pleasanton Unified School Dist.*, 320 F.3d 979 (9th Cir. 2003); *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092 (9th Cir. 2000) and *Ashby v. Isle of Wight County School Bd.*, 354 F. Supp. 2d 616 (E.D. Va. 2004)). In *Lassonde*, *Cole* and *Ashby*, the courts found that the districts' control over the entire graduation ceremony justified their actions. *Lassonde*, 320 F.3d at 981; *Cole*, 228 F.3d at 1096; *Ashby*, 354 F. Supp. 2d at 631. There is no record of comparable control in this case. More importantly, even if *Lassonde* and *Cole* were seen as consistent with the Tenth Circuit's holding, those four cases conflict with *Ingebretsen*, *Chandler*, and *Adler*. The District's omission does not erase the conflict.

Neither does the District's creative rewriting of *Adler* resolve the conflict. The factual similarity and contrasting legal holdings in *Adler* and this case illustrate the circuit conflict that this Court should resolve. The District attempts to disprove the conflict by falsely painting *Adler* as a case of a rogue school district abdicating its authority, even to the point of permitting a student to give "an exhortation to engage

in unprotected sex with multiple partners." (Opposition Brief, p. 11). The District then distorts the holding in *Adler* as granting school officials permission to abdicate control over graduation ceremonies. (Opposition Brief, p. 11). Actually, the Eleventh Circuit held that graduation speeches presented by students under a policy in which students choose whether there will be a speech, who will speak, and what the topic will be is not school-sponsored. *Adler*, 250 F.32d at 1338. In this case, the Tenth Circuit held that graduation speeches presented by students under a policy in which students choose whether there will be a speech, who will speak and what the topic will be is school-sponsored. (App., 20a). That conflict should be resolved by this Court.

III. THE DISTRICT'S FALSE PRESUMPTIONS DO NOT REMEDY THE SIGNIFICANT CONSTITUTIONAL INFIRMITIES IN THE TENTH CIRCUIT'S DENIAL OF THE COMPELLED SPEECH CLAIM.

The District asks this Court to accept as true that "the school's prior review policy was constitutional" and that the Tenth Circuit properly found that the District could discipline Petitioner by compelling her to apologize in a prescribed way before receiving her diploma. (Opposition Brief, p. 13). That being the case, according to the District, there is no need for this Court to review the Tenth Circuit's denial of Petitioner's compelled speech claim. The District's underlying presumptions are false, as is its claim that the Tenth Circuit's denial of the compelled speech claim comports with precedent.

Neither the district court nor the Tenth Circuit

determined whether the District's policy of having the principal review valedictory speeches prior to graduation was constitutional. Nevertheless, the District claims that this Court should accept as "given" that the District's policies are constitutional and sufficient to justify its sanctions against Petitioner's speech. (Opposition Brief, pp. 6, 13). The Tenth Circuit adopted the District's position without analyzing the policies, despite this Court's strong condemnation of prior restraints, *See Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1975) (prior restraints are "the most serious and the least tolerable infringement on First Amendment rights"), and its own rejection of disciplinary sanctions for First Amendment activities. *Bertot v. School Dist. No. 1*, 522 F.2d 1171, 1183 (10th Cir. 1975). The District argued and Tenth Circuit erroneously determined that *Kuhlmeier*'s grant of limited authority over school-sponsored speech somehow trumps protection against prior restraints. According to the Tenth Circuit, *Kuhlmeier* was also a grant of authority to use deprivation of First Amendment rights as "leverage" against "bad behavior." (Opposition Brief, p. 21; App., 25a-26a). That unwarranted expansion of *Kuhlmeier* is inconsistent with the carefully constructed limitations of the *Kuhlmeier* decision and contradicts this Court's continuing protection of student free speech rights under Tinker. *See Morse,*, 551 U.S. at 403-405.

The Tenth Circuit's denial of Petitioner's compelled speech claim also conflicts with this Court's holding in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 631 (1943). As former Chief Justice Rehnquist stated, "Compulsion, after *Barnette*, is not permissible...." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring). Nevertheless, the Tenth Circuit

found no error in the District compelling Petitioner to apologize, using certain language, under the threat of not receiving her diploma. (App., 26a). The District attempts to justify the Tenth Circuit's holding by claiming that *Barnette* is inapplicable because Petitioner was not required to renounce her faith. (Opposition Brief, p. 13). That conclusion not only misrepresents *Barnette*'s holding, but also conflicts with this Court's continuing protection of First Amendment rights in school settings. *See Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864-865 (1982) ("we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment").

This Court has established that educators must temper their pedagogical authority with due consideration of students' First Amendment rights. Educators are to strike a balance between authoritative discipline and student free speech. *Id.* That balance is not achieved by using deprivation of First Amendment rights as "disciplinary leverage" to compel "good behavior," as the District asserts. (Opposition Brief, p. 21). The mere possibility that the District could use students' First Amendment rights as "leverage" to compel conformance and the Tenth Circuit would sanction such a concept is reason enough to review the Tenth Circuit's decision.

CONCLUSION

The Tenth Circuit misapplied this Court's student speech precedents when it rejected *Tinker* in favor of *Kuhlmeier* as the standard for Petitioner's claims. The Tenth

Circuit's findings that the graduation speeches are part of school-sponsored events bearing the imprimatur of the school conflicts with precedents in the Court and in other circuits. Denying Petitioner's compelled speech claim conflicts with this Court's student speech and compelled speech precedents.

For these reasons, Petitioner respectfully requests that this Court grant her Petition.

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